Ontario

The Boundaries Act

(R. S. O. 1990, Chapter B. 10)

IN THE MATTER of an application for confirmation of the true location on the ground of the boundaries of Lot 112, Registered Plan 1446 in the Township of Tiny, in the County of Simcoe designated as PIN 58400-0003(R).

ORDER

This is an application made by John Joseph Marion and Elisabeth Marion, the registered owners of the lands designated as PIN 58400-0003(R) for the purpose of confirming, under the *Boundaries Act*, the true location on the ground of the boundaries of Lot 112, Registered Plan 1446 in the Township of Tiny, in the County of Simcoe in accordance with a draft plan of survey with the aforementioned boundaries shown by heavy solid lines, made by Marshall Macklin Monaghan Ontario Limited dated 5 May 2005 and signed by R. J. Stewart, Ontario Land Surveyor.

All interested parties to the application were served by prepaid registered mail with a copy of the Notice of Application, together with a copy of the draft plan of survey.

Letters of objection were received from :

1. Carol & Murray Donaldson and Barry & Brenda Spring on behalf of 1351 residents of Tiny Township.
2. Carol Donaldson & George Lawrence on behalf of "Tiny's Residents Working Together Ratepayers Association".
3. Donald D'Aoust on behalf of the Directors of "The Save the Beaches Inc".
4. Bob and Erica Buschousky, residents of Tiny Township.
5. Deb Dorsey & Ron Winn, residents of Tiny Township.
6. Donald Horgarth on behalf of 34 residents of Tiny Township.
7. Linda Wolanski, resident of Tiny Township.
8. Jane and Bob Teschke, residents of Tiny Township
9. Joan Duquette, resident of Tiny Township.
10. Erna Gibson, resident of Tiny Township.
11. Jane Lippert, resident of Tiny Township.
12. Elizabeth Bastable, resident of Tiny Township.

This Application came before me in meeting Room B at the Simcoe County Museum, located at 1151 Hwy 26 West Minesing Ontario L0L 1Y2 on the 21st day of March 2006 at 9:30 o'clock in the morning.

At this hearing there appeared before me:

> **Ronald J. Stewart O.L.S., surveyor for the applicant and witness**
> **John Joseph Marion, applicant**
>
> **George Lawrence on behalf of "Tiny's Residents Working Together Ratepayers Association", and on behalf of Carol & Murray Donaldson and Barry & Brenda Spring on behalf of 1351 residents in Tiny Township, objector**
>
> **Deb Dorsey and Ron Winn, objectors**

The other objectors listed above did not attend the hearing and were not represented by counsel. Their objections were DISMISSED and the hearing proceeded as scheduled with the parties in attendance.

There was one exhibit filed at the hearing and that exhibit was a SURVEY REPORT prepared by Ronald J. Stewart O.L.S. dated May 2005 of an investigation respecting the boundaries of Lot 112 Registered Plan 1446 Township of Tiny.

THE ISSUES

There were no objections raised with regard to the northerly, southerly or easterly boundaries of Lot 112, Registered Plan 1446. The objections are with respect to the location of the westerly boundary of Lot 112, Registered Plan 1446 at the water's edge and the projection of the northerly and southerly boundaries to that location. The objectors contend that the westerly limit of Lot 112, Registered Plan 1446 is located at the "High Water Mark" some distance east of the water's edge and that the intervening beach is public.

THE ORDER

Upon consideration of all of the evidence presented at the hearing and filed with the application, the submissions of counsel and the applicable law, I find as follows:

I DO HEREBY ORDER that the application is ALLOWED.

I DO FURTHER ORDER that the objections are dismissed.

I DO ORDER THAT the westerly boundary of Lot 112, Registered Plan 1446 is CONFIRMED as located at the natural water's edge, where it is actually located from time to time.

I DO ORDER THAT the northerly and southerly boundaries of Lot 112, Registered Plan 1446 are CONFIRMED and are located as established by Mr. Ronald J. Stewart and illustrated on the draft plan of survey dated 5 May 2005, accompanying the application and the westerly projection thereof to intersect the westerly boundary, being the natural water's edge, as previously ordered.

I DO ORDER THAT the easterly boundary of Lot 112, Registered Plan 1446 being the westerly boundary of Tiny Beaches Road South is CONFIRMED and is located as established by Mr. Ronald J. Stewart and illustrated on the draft plan of survey dated 5 May 2005, accompanying the application.

I DO ORDER that the confirmed boundaries be monumented in accordance with section 9 of O. Reg. 525/91 and that any conflicting monuments be removed.

I DO FURTHER ORDER that a final plan of the confirmed boundary be prepared by the applicant's surveyor, to the satisfaction of the Director of Titles and be registered in the appropriate land registry office as prescribed by section 16 of the *Boundaries Act*. The final plan of the confirmed boundaries shall be submitted to the office of the Director of Titles within three months from the date of this order, if no appeal is taken, or should an appeal be taken, within two months after the appeal has been disposed of by the Court.

COSTS
The applicant requested his costs. I concluded that the objections were not frivolous or vexatious and therefore that the parties should be responsible for their own costs.

DATED at my office in the
Village of Komoka in the
Municipality of Middlesex Centre in the
County of Middlesex
This 31st day of May 2006.

J. S. Cotterill O.L.S., O.L.I.P.
Deputy Director of Titles

B-1178

Ontario

The Boundaries Act

(R. S. O. 1990, Chapter B. 10)

IN THE MATTER of an application for confirmation of the true location on the ground of the boundaries of Lot 112, Registered Plan 1446 in the Township of Tiny, in the County of Simcoe designated as PIN 58400-0003(R).

REASONS

This is an application made by John Joseph Marion and Elisabeth Marion, the registered owners of the lands designated as PIN 58400-0003(R) for the purpose of confirming, under the *Boundaries Act*, the true location on the ground of the boundaries of Lot 112, Registered Plan 1446 in the Township of Tiny, in the County of Simcoe in accordance with a draft plan of survey with the aforementioned boundaries shown by heavy solid lines, made by Marshall Macklin Monaghan Ontario Limited dated 5 May 2005 and signed by R. J. Stewart, Ontario Land Surveyor, a reduced copy of which is appended to these reasons.

All interested parties to the application were served by prepaid registered mail with a copy of the Notice of Application, together with a copy of the draft plan of survey.

Letters of objection were received from:

1. Carol & Murray Donaldson and Barry & Brenda Spring on behalf of 1351 residents of Tiny Township.
2. Carol Donaldson & George Lawrence on behalf of "Tiny's Residents Working Together Ratepayers Association".
3. Donald D'Aoust on behalf of the Directors of "The Save the Beaches Inc".
4. Bob and Erica Buschousky, residents of Tiny Township.
5. Deb Dorsey & Ron Winn, residents of Tiny Township.
6. Donald Horgarth on behalf of 34 residents of Tiny Township.
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9. Joan Duquette, resident of Tiny Township.
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This Application came before me in meeting Room B at the Simcoe County Museum, located at 1151 Hwy 26 West Minesing Ontario L0L 1Y2 on the 21st day of March 2006 at 9:30 o'clock in the morning.

At this hearing there appeared before me:

Ronald J. Stewart O.L.S., surveyor for the applicant and witness
John Joseph Marion, applicant

George Lawrence on behalf of "Tiny's Residents Working Together Ratepayers Association", and on behalf of Carol & Murray Donaldson and Barry & Brenda Spring on behalf of 1351 residents in Tiny Township, objector

Deb Dorsey and Ron Winn, objectors

The other objectors listed above did not attend the hearing and were not represented by counsel. Their objections were dismissed and the hearing proceeded as scheduled with the parties in attendance.

There was one exhibit filed at the hearing and that exhibit was a SURVEY REPORT prepared by Ronald J. Stewart O.L.S. dated May 2005 of an investigation respecting the boundaries of Lot 112 Registered Plan 1446 Township of Tiny.

THE ISSUES

There were no objections raised with regard to the northerly, southerly or easterly boundaries of Lot 112 Registered Plan 1446. The objections are with respect to the location of the westerly boundary of Lot 112 Registered Plan 1446 at the water's edge and the projection of the northerly and southerly boundaries to that location. The objectors contend that the westerly limit of Lot 112 Registered Plan 1446 is located at the "High Water Mark" some distance east of the water's edge and that the intervening beach is public.

EXPERT TESTIMONY

Mr. Stewart was the only expert witness appearing before me at this hearing. He reviewed the material contained in his SURVEY REPORT for the benefit of the chairman and the others in attendance.

The subject lands were originally part of the original Crown subdivision of the Township of Tiny and were located in Lot 17 and broken Lot 18 Concession 9. The Crown granted broken Lot 18 to Thomas Cundle in 1866. The land was described as "sixty two acres ...Lot number Eighteen in the Ninth Concession of the Township of Tiny ... Reserving free access to the shore of Lake Huron for all vessels, boats and persons" and "saving, excepting and reserving ... the free uses, passage and enjoyment of, in, over and upon all navigable waters ..." It is Mr. Stewart's professional opinion that "The west boundary of Lot 18 is the normal ordinary water's edge of Nottawasaga Bay of Lake Huron. The original grant from the Crown conveyed all of Lot 18 and the reservations were in the form of easements; thus, the Crown retained no dry land between the patented lands and the water's edge of Nottawasaga Bay."

In 1909 the north half of Lot 18 passed to Gignac and Brunelle by deed registered as number 8084. There were no metes and bounds noted in the deed and it therefore follows that the westerly boundary of the north half, being the lakewards boundary, is in the same location as the westerly boundary of the Lot as patented.

Gignac and Brunelle subdivided the north half of Lot 18 beginning in 1920 by deeds with metes and bounds descriptions. There were references made to an "unregistered" plan of lots, a copy of which has been appended to the abstract index for Lot 18 Concession 9 in the Land Registry Office.

In June 1922 Gignac and Brunelle conveyed a parcel of land to George Kitching by deed numbered 11516. This parcel is described by metes and bounds with the westerly limit being the "...high-water line on the shore of Nottawasaga Bay...". The deed also contained a clause "Saving and

Reserving therefrom a road allowance of 66 feet in perpendicular width along the beach or shore of said Bay, for the purpose of a highway." The significance of the wording and the reservation will be discussed in greater detail later in these reasons.

In August of 1922 Kitching transferred the same parcel to Leslie Spring by deed numbered 11514. The description is the same, including the reservation above noted, except that the term "high-water line" is changed to "water's edge" and this transfer also includes an 18 foot wide strip of Lot `17 concession 9 along the easterly side. This parcel later was subdivided and designated as Lots 111, 112 and 113, Plan 1446.

In 1928 Spring conveyed the south 50 feet of the last mentioned parcel by deed numbered 13159. This is the document that creates the parcel subsequently designated as Lot 111. The parcel is described by metes and bounds reverting back to the "high-water line" designation for the west limit. This deed also reserves a "road allowance" of 66 feet in perpendicular width "along the beach at the westerly side". The east boundary is described as being also the westerly boundary of a "30 foot reservation for public road". The 30-foot strip subsequently becomes First Street on Plan 1446.

The remainder of the Spring parcel was split into two pieces, the northerly 35 feet being conveyed to Homer and Meryle Spring in 1944 by deed numbered 17174 and the remainder 145 feet being conveyed in several documents culminating with 19024 in 1946 to Margretta Bell. All of these documents continue to use the term "high-water line" and include the reservation of a 66-foot wide "road allowance" at the shore. The boundary between Homer and Meryle Spring and Margretta Bell is subsequently adjusted by the conveyance by Bell to Spring of the northerly 5 feet of her property in 19024 and a further 25 feet in 21630 leaving the Homer Spring property now 65 feet wide and the remaining Bell property at 115 feet. These various deeds still use the term "high-water line" and include the reservation of a 66-foot road.

In 1959 the consolidated Homer Spring parcel was conveyed to Frank Kirke by 101128 still using the "high-water line" description but now omitting any reference to a road allowance reservation. Also in 1959 Margretta Bell conveyed a further 40 feet to Frank Kirke by 105870 that also described the west limit as along the "high-water line" but again omitted any mention of a reservation for road allowance along the shore. The Kirke Property is now 105 feet wide and later becomes designated as Lot 113 on Plan 1446. The remainder of the Margretta Bell lands becomes Lot 112.

Registered Plan 1446 was registered in June of 1962 pursuant to a Judge's Order registered as instrument 165692. The purpose of the plan was not to create any new lots but to provide a "graphic index" of lots as they already existed, having been previously created by prior registered plans or by conveyances with metes and bounds descriptions. The plan illustrated the relationship of the various parcels one to the other and resulted in a new unique lot numbering system that allowed for simplified abstracting and conveyancing. The plan was partly the result of a survey by John Harvey O.L.S. and partly compiled from records in the Land Registry Office. O.L.S. Harvey indicated in his certificate on the plan that all lot corners were posted with wood stakes. O.L.S. Harvey established the Nottawasaga Bay boundary along his definition of the "high water mark" without indicating what evidence was used to determine that location. He did not show the actual location of the water's edge. He illustrated a strip of land in phantom across the front of Lots 95 to 113 and labeled it "66' Right of Way". He further labeled the 30-foot road mentioned in various deeds as "First Street" and indicated in his schedule that the Township of Tiny owned First Street.

Subsequent to the registration of Plan 1446, Lot 112 has been conveyed five times, most recently to John Joseph Marion and Elisabeth Marion in 1984 by deed numbered 831858. The first two conveyances described the lands as simply Lot 112. The third conveyance instrument 448182 had a plan attached by John Harvey O.L.S. dated August 1, 1973 which showed the 66 foot right of way in phantom adjoining the "high water mark", on the landward side, and that deed and subsequent deeds described the land as "subject to a 66 foot right-of-way over the westerly 66 feet".

It was Mr. Stewart's professional opinion that the location of the westerly (lakewards) boundary of the Marion property is dependent upon the answers to two questions. What is the meaning of the term "high-water line"? What was intended by the reservation in the deed by Gignac and Brunelle of a 66-foot wide strip along the shore for a "road allowance"?

In attempting to answer the first question, Mr. Stewart reviewed the history of the term "high water mark" and its application to lands adjoining navigable waters in Ontario. Mr. Stewart stated that the term as derived from the common law of Great Britain is only applicable to bodies of water that are affected by the daily action of tide. This would only then apply to the shores of Hudson Bay and James Bay. He explained that for decades the term was used in conveyancing in Ontario and that the officers of the Ontario Department of Lands and Forests and later the Ministry of Natural Resources, as administrators of Crown lands, vigorously promoted the use of the term and interpreted it to mean the landward side of the beach. They considered the beach to be part of the bed of the water body and therefore unalienated Crown land. This concept was even enshrined in legislation in an omnibus bill titled the *Statute Law Amendment Act* S.O.1940, c.28. Mr. Stewart was of the opinion that this was contrary to well-established common law and was found to be unworkable so was repealed by *the Beds of Navigable Waters Amendment Act,* S.O. 1951, c.5. He said that the courts had been consistent in applying the common law rule and placing the boundaries of non-tidal riparian properties at the water's lowest mark. Even so, many surveyors were not aware of the common law and applied the meaning promoted by the Ministry of Natural Resources for many years after the 1951 legislation.

Mr. Stewart went on to explain that there were two exceptions to the common law rule if (1) the words of the grant clearly reserve space between the water and the granted uplands; or (2) if the boundaries of the granted uplands are clearly defined by an original plan of survey which is unequivocal in demonstrating an intention on the part of the Crown to retain space between the water and the granted lands. It was Mr. Stewart's opinion upon examination of the Crown Grant to Thomas Cundle that the Crown reserved no space. It followed then that the lands as granted to Cundle and subsequently conveyed through the series of deeds up to Gignac and Brunelle were bounded by the water's edge at low water.

Mr. Stewart discussed the meaning of the reservation in the conveyance from Gignac and Brunelle to Kitching which meaning must now be determined. One explanation of the reservation might be that Gignac and Brunelle intended to keep ownership of a 66-foot wide strip for the purpose of making a road or highway. Mr. Stewart found no evidence that such a highway had ever been constructed, or that such a highway had ever been dedicated to the municipality for a public road or that the Municipality had ever accepted such a road for public highway either by by-law or by the expenditure of public funds in the maintenance of such. In fact, Gignac and Brunelle have never dealt with the 66-foot wide strip in any subsequently registered instrument and they have never registered a "Notice of Claim" pursuant to subsection 113(2) of the *Registry Act.* The Judge's Plan 1446 illustrates the 66-foot wide strip as a "right-of-way" indicating an easement to accommodate access to the row of shoreline properties that Gignac and Brunelle intended to convey. It is interesting to note that although the strip was reserved from the Kitching parcel and several others, no parcels were ever granted together with such an easement or right-of-way. No dominant tenement was ever identified in any title document that was made subject to the reservation. It was Mr. Stewart's opinion that the reservation became redundant when the 30-foot wide road shown as First Street on Plan 1446 (now Tiny Beaches Road South) was created. Mr. Stewart contends that this reservation was intended to be a right of way only and that as the reservation has been dropped from many of the modern conveyances of lands that were once subject to it, and that no road presently exists on the ground, it is reasonable to accept that the right of way has been abandoned. In support of this assumption Mr. Stewart draws our attention to a declaration by Frank Kirke deposited as number 271463 with respect to the northerly part of the former Kitching lands, now Lot 113, wherein he states in 1968 that he has "never heard of any claim of easement affecting the lands, either for light, drainage, or right of way or otherwise". This issue was also the subject of an action pursuant to the *Vendors and Purchasers Act* with respect to Lot 113 in 1984.The Judge's Order in that action deposited as number 833112 declares this shore reservation to be a right of way, which is abandoned. Mr. Stewart has formed the opinion that the reservation by Gignac and Brunelle was intended to be a right of way only, not a reservation of ownership, and that it has been abandoned. He therefore concludes that no land was retained between Lot 112 and the water's edge and that Lot 112 extends to the water's edge. Survey monuments have marked the other boundaries of Lot 112 since at least 1962 and their actual location on the ground has not varied. No objections were filed in respect of any boundary other than the lakewards boundary and the projection of the northerly and southerly boundaries to that location.

THE LAW

The purpose of this application pursuant to the *Boundaries Act* is to determine the boundaries of Lot 112, as they exist at law. We must interpret the various descriptions of the land that have existed at various times in order to determine the extent of title. It was necessary to look to the law for direction in this interpretation particularly for guidance in answering two questions; "1) Did the Crown grant lots bounded by water or did it retain ownership of the beach?" and "2) What is the meaning of the description and of the "Saving and Reserving" clause in the conveyance from Gignac and Brunell to Kitching and by extension, does it indicate an intention to retain title to lands between the lands granted and the water?". The tribunal is fully cognizant of the fact that it has no jurisdiction to determine whether any parties have acquired any rights or interests in the land by usage nor does it have any authority to award any land to the applicants that they do not already own.

To answer the first question, we must examine the words of the first conveyance from the Crown to Thomas Cundle in 1866. The land was described as "sixty two acres ...Lot number Eighteen in the Ninth Concession of the Township of Tiny aforesaid. Reserving free access to the shore of Lake Huron for all vessels, boats and persons" and "saving, excepting and reserving ... the free uses, passage and enjoyment of, in, over and upon all navigable waters ..." The description in this grant from the crown includes no metes and bounds to further define the lands. The lands are only defined in respect of the original plan of survey for the Township, which one must consider to be an integral part of the description. The plan of survey shows only an unlabelled line between the lake and the lot. There is no indication whatsoever that the Crown intended this line to be anything other than the line created where the edge of the water touches the land. In the case of *The Attorney General for Ontario v. The Rowntree Beach Association et al*, which dealt with Broken Lot 18 in the Eleventh Concession of the Township of Tiny, Finn, J. heard a substantial volume of evidence and reviewed and referred to many court cases in considering this very question before he says:

> " ...**I have concluded that the westerly boundary of lot 18 is the water's edge of Nottawasaga Bay** ..."

and further

> "... **I conclude that free access to the shore of Lake Huron for all vessels, boats and persons is limited to the right to pass along or across the shore to exercise a right of navigation**..."

In *Walker et al and Attorney General for Ontario (1971)*, 14 D.L.R. (3d) 643 (Ont.H.C.); aff'd (1972), 26 D.L.R.(3d) 162 (C.A.); aff'd (1974), 42 D.L.R. (3d) 629. at p.673 Stark J. says:

> **"It appears to me therefore that I am driven to this conclusion that any Crown patent which indicates that one of the boundaries of the lands granted is to be a boundary of water then it establishes that boundary as at the water's edge and not upon any bank or high water mark unless of course the grant clearly reserves by description or otherwise a space between the lands granted and the water boundary or unless the boundaries of the lot can be so clearly delineated by reference to an original plan of survey as to clearly except or reserve to the Crown a space between the lands granted and the water's edge"**

The foregoing confirms Mr. Stewart's opinion that "The original grant from the Crown conveyed all of Lot 18 and the reservations were in the form of easements; thus, the Crown retained no dry land between the patented lands and the waters of Nottawasaga Bay." I concur. The answer to question one is therefore that the Crown did not retain title to the beach.

In pursuing an answer to question 2, I have reviewed the deed from Joseph Gignac and Peter Brunelle to George Kitching, which is registered as instrument 11516. The deed describes "...a point at high-water line on the shore of Nottawasaga Bay, hereinafter called point A" and later "... to the said high-water line of said shore, and thence Northerly along the said high-water line to the said point A". What then is meant by this reference to a "high-water line" and does it signify an intention to limit the conveyance at some distance away from the actual water's edge? Mr. Stewart was of the opinion that the courts have been consistent when deciding on the location of water boundaries adjoining non-tidal inland waters in Ontario that regardless of the terminology actually

used in the document, the interpretation to be used is that the boundary between land and water is at the water's lowest mark. The objectors gave no testimony nor did they call any expert witnesses to speak to this issue. From the commentary and the nature of some of their questions it became evident that they have somehow concluded that the law is not clear in this matter and that there is some legal confusion about the ownership of the beach. I suspect that they and many of the other objectors and signatories to petitions etc. have been led to believe that the various amendments to statutes have left some kind of "no-man's land" between the lake front owners and the water of the lake. Actually there is no confusion and to illustrate that the courts have clearly stated the law I will quote extensively from *Attersley et al v. Blakely et al.*(1970) 13 D.L.R.(3d) p.39 to p. 49, which is the decision of the Court of Appeal wherein the lower court decision of Lane, Co. Ct. J. was upheld. MacKay, J.A. for the Court of Appeal noted that:

> **"The learned trial Judge, His Honour Judge Lane, has written a very detailed and careful judgement in which he carefully and in detail reviews both the facts as given in evidence and the applicable law ..."**

His Honour, Judge Lane's summary of the law is as follows:

> **"...It is urged upon me by Mr. Nourse that the boundary line between land and navigable water is the high water mark, and he cites to me in support of this position the *Beds of Navigable Waters Act,* R.S.O.1960, c. 32, s. 1. In checking this statute, I cannot find any support for his proposition. However, in going into the statutory law concerning the *Beds of Navigable Waters Act,* which in its latest version is R.S.O. 1960, c. 32 I find that there have been a number of changes in this Act over the years. Originally, the rights of the parties were governed by the common law without statutory interference. This appears to have been the case up to March 24, 1911, when by 1911 (Ont.) c. 6 the *Beds of Navigable Waters Act,* received assent. Under this Act, particularly s. 2, the Legislature decided that in the absence of an express grant the bed of a body of navigable water was not intended to pass to the grantee of land and it thereby altered the older rules of the English common law statutorily. There was apparently no change in this law until 1940, when the *Beds of Navigable Waters Act* was amended by the *Statute Law Amendment Act,* 1940 (Ont.) c. 28, s. 3, and in this amendment to the *Beds of Navigable Waters Act,* for the first time, the Act defines "bed" and "high water mark" as follows:**
>
> 1. In this Act,
> (a) "bed" used in relation to a navigable body of water shall include all land and land under water lying below the high water mark; and
> (b)"high water mark" shall mean the level at which the water on a navigable body of water has been held for a period of sufficient time to leave a water mark along the bank of such navigable body of water.
>
> **Therefore, from 1940 the boundary line under this amending statute between land and water was the high water mark, as defined. This, however, was again changed in 1951 by an Act entitled "An Act to Amend the Beds of Navigable Waters Act", which was assented to on April 5, 1951 and is to be found in 1951 (Ont.), c. 5. Under ss. 1 and 2, ss. 1 and 2 of the old *Beds of Navigable Waters Act,* which had been brought down into the R.S. O. 1950, c. 34, were repealed. This Act and the sections particularly involved are ss.1 and 2, which read as follows:**
>
> 1. Section 1 of the *Beds of Navigable Waters Act* is repealed.
> 2. Section 2 of the *Beds of Navigable Waters Act* is repealed and the following substituted therefore:
> 2. Where land that borders on a navigable body of water or stream, or on which the whole or part of a navigable body of water or stream is situate or through which a navigable body of water or stream flows, has been heretofore or is hereafter granted by the Crown, it shall be deemed, in the absence of an express grant of it, that the bed of such body of water was not intended to pass and did not pass to the grantee.
>
> **In effect, therefore, this amending statute once again changes the law to wipe out the definition of the boundary between land and water as the high water mark, as has been held in *Re Todd and Walker,* [1954] O. W. N. 814, [1955] 1 D.L.R. 495, and substitutes the rule which had been in existence except in so far as it is excepted under s. 2 of this amending statute with regard to the ownership of land as it borders on water. It would seem, therefore, that the old common law rule as to the boundary between land and water placing it at the water's lowest mark is the law as it stands at**

the moment: *Stover v. Lavoie (1960)*, 8 O. W. R. 398; affirmed 9 O. W. R. 117 (C.A.)

In light of *Attersley v. Blakely* I conclude that the land that is of interest in this case was conveyed by the Crown to the low water mark and that Gignac and Brunelle owned to the low water mark and that the words of their conveyance to Kitching must be interpreted as going to the low water mark unless this is varied by the "Saving and Reserving" clause.

One interpretation of this clause might suggest that Gignac and Brunelle intended to keep the fee in a 66-foot wide strip for the purpose of making a road or highway. Mr. Stewart testified that his best efforts failed to unearth evidence to confirm that any public road had ever been formally created or dedicated. He also found no further dealings with this land by Gignac and Brunelle since this 1922 conveyance. He also testified that this proposition had been considered in an action pursuant to the *Vendors and Purchasers Act* with respect to the adjoining Lot 113 in 1984. In the Judge's Order in that action deposited as number 833112 Mr. Justice Logan declares this shore reservation to be right of way, which is abandoned.

In seeking some clarification, as to how the courts have dealt with the interpretation of such reservation clauses, I discovered that the interpretation of such a clause had been necessary in the case of *Gibbs et al v. The Village of Grand Bend et al*, (1995) Ontario Court of Appeal (Court Files C9954 & C9961) and that Finlayson, J.A. in writing the decision for the court had reviewed many textbooks and prior cases and concluded:

> **"These sources indicate that a reservation, unlike an exception, confers only a limited right to use the lands to which it applies. It does not purport to retain title to the subject land. In contrast, an exception has the effect of retaining title to the excepted lands in the grantor."**

From this I conclude that Gignac and Brunelle conveyed the fee in the lands to Kitching to the water's edge and reserved only an easement or right of way over the 66-foot strip for the stated purpose of a road. It is not within the jurisdiction of this tribunal to decide whether or not this right of way has expired or been abandoned or who, if anyone, has the benefit of such a right of way. In any case, it is only necessary for the determination of this matter to determine that Gignac and Brunelle did, in fact, convey the fee and title to Kitching right to the water's edge.

The subsequent conveyances from Kitching and his successors that resulted in the creation and resale of what became Lots 111, 112 and 113 used the same terminology with regard to "high water mark" and must be interpreted in light of the foregoing analysis to extend to the water's edge notwithstanding their depiction on Plan 1446 as stopping at a "high water mark". Further, since Plan 1446 does not actually create discreet lots but only illustrates and provides lot number designations for parcels that already existed at the time of its certification, it also must be interpreted in light of the direction from the courts, as outlined in the foregoing analysis, as extending these lots to the water's edge.

The conveyance to John Joseph Marion and Elisabeth Marion describes the lands simply as Lot 112 on Plan 1446 subject to a right of way over the westerly 66 feet. There are plans of survey by John Harvey O.L.S. and Gary Preston O.L.S. that purport to locate the boundaries of Lot 112 and which extend only to a "high water mark" as illustrated on Plan 1446. The depth of Lot 112 is shown to be about 146 to 148 feet. These surveys illustrate absolutely no method for establishing the location of this high water mark and also do not locate the actual water's edge. It was explained by Mr. Stewart that they were probably applying the convention that was long promoted by officers of the Ministry of Natural Resources to locate such a line at the back edge of the beach. He observed, that until recent years, many practicing surveyors were not well aware of the opinions expressed by the courts in this matter. In comparing these plans and Plan 1446 with the draft plan of survey prepared by Mr. Stewart in support of this application, one is immediately aware of a substantial difference in the depth of the lot as a result of accepting the water's edge in lieu of the "high water mark" as defining the westerly limit. Instead of a depth of 146 to 148 feet the lot now has a depth of approximately 272 to 291 feet. How do we reconcile such substantial discrepancies? It is my conclusion that the prior analysis with regard to the Crown patent and subsequently to the conveyances to Gignac and Brunelle and to Kitching must apply equally to the interpretation of Plan 1446 and to the conveyance to Mr. and Mrs. Marion. The judgments reviewed herein are clear

that, unless a deed contains a clear statement of an intent to retain ownership of the beach, it must be concluded that the intention was to convey a property to the waterfront limit as owned by the grantors and not to retain any land between that property and the water. If there was some mistaken impression on behalf of conveyancers and surveyors that the beach was retained by the Crown and that as a result the transfer of all the land they owned was to be limited by the "high water mark" then the conveyances must be interpreted in light of the judgments of the courts as to the interpretation of the term "high water mark" as being synonymous with what can be clearly recognized as the natural water's edge. This is an explanation of why the distances called for in the deed do not conform to what is measured on the ground. Even if such an explanation were lacking, there is much case law to support the proposition that if the distances called for in a deed are not sufficient to reach a natural feature that is described as being a boundary, the lines must be extended to reach the natural feature. Stark, J. summarized the principle quite clearly in *McPherson et al v. Cameron* (1868) 7 N.S.R. 208 (C.A.) when he says:

> **"The general rule to find the intent where there is ambiguity in the grant, is to give most effect to those things about which men are least liable to mistake; *Davis v. Rainsford, 17 Mass. 210.* On this principle the things usually called for in a grant, that is, the things by which the land granted is described, have been thus marshaled: *First,* the highest regard had to natural boundaries; *Secondly,* to lines actually run and courses actually marked at the time of the grant; *Thirdly,* if the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established; *Fourthly,* to courses and distances, giving preference to one or the other according to circumstance; *Greenleaf on Evidence p. 441, n 2,* and the case referred to."**

He goes on to say:

> **"The Authorities are clear upon the point as to extending courses and distances to reach an object given in the grant. *Spence, C.J., in Jackson v. Loomis, 18 Johns, 86,* says "If courses and distances are given to reach an object, and if they will not reach it, you must go to the object as the most certain." And this opinion is only in accordance with the general principles I have already referred to."**

I am satisfied that Mr. Stewart has established the westerly boundary of Lot 112 at the water's edge in accordance with the law and accepted survey practice.

THE DECISION

Upon considering the evidence, the material filed with the application and the applicable law, I conclude that the boundaries of Lot 112 Plan 1446 are located as established by Mr. Stewart and as illustrated on his draft plan of survey filed in support of the application. Accordingly, the application of John Joseph Marion and Elisabeth Marion is GRANTED. All objections are DISMISSED.

It should be noted that I have confirmed the westerly boundary of Lot 112 at the natural water's edge. The draft plan of survey prepared by Mr. Stewart illustrates the natural water's edge where it was located in December 2004. The confirmation should not be read as an attempt to "fix" this boundary at the location illustrated. What is confirmed is the character of the boundary as the natural water's edge, which is an ambulatory boundary, and its location will be wherever it is found from time to time.

While I appreciate there are strong views involved with respect to the use of the beach and ancillary rights, as noted elsewhere in these REASONS, it is outside the jurisdiction of this tribunal to decide whether or not the reservation of the right of way in the conveyance from Gignac and Brunelle to Kitching has been abandoned and, accordingly, I have made no decision in that matter nor have I determined what lands have the benefit of such a right of way if it has not been abandoned. Similarly, it is outside the jurisdiction of this tribunal to determine whether any persons or the public in general has acquired any rights to access or usage of the beach by user, prescription or otherwise. I have therefore made no decision in this matter. If these issues are to be pursued, they must be decided in another venue, perhaps an application for absolute title under the *Land Titles*

Act or some proceeding before a court of competent jurisdiction. Again, these are title related issues beyond the jurisdiction of this tribunal to decide.

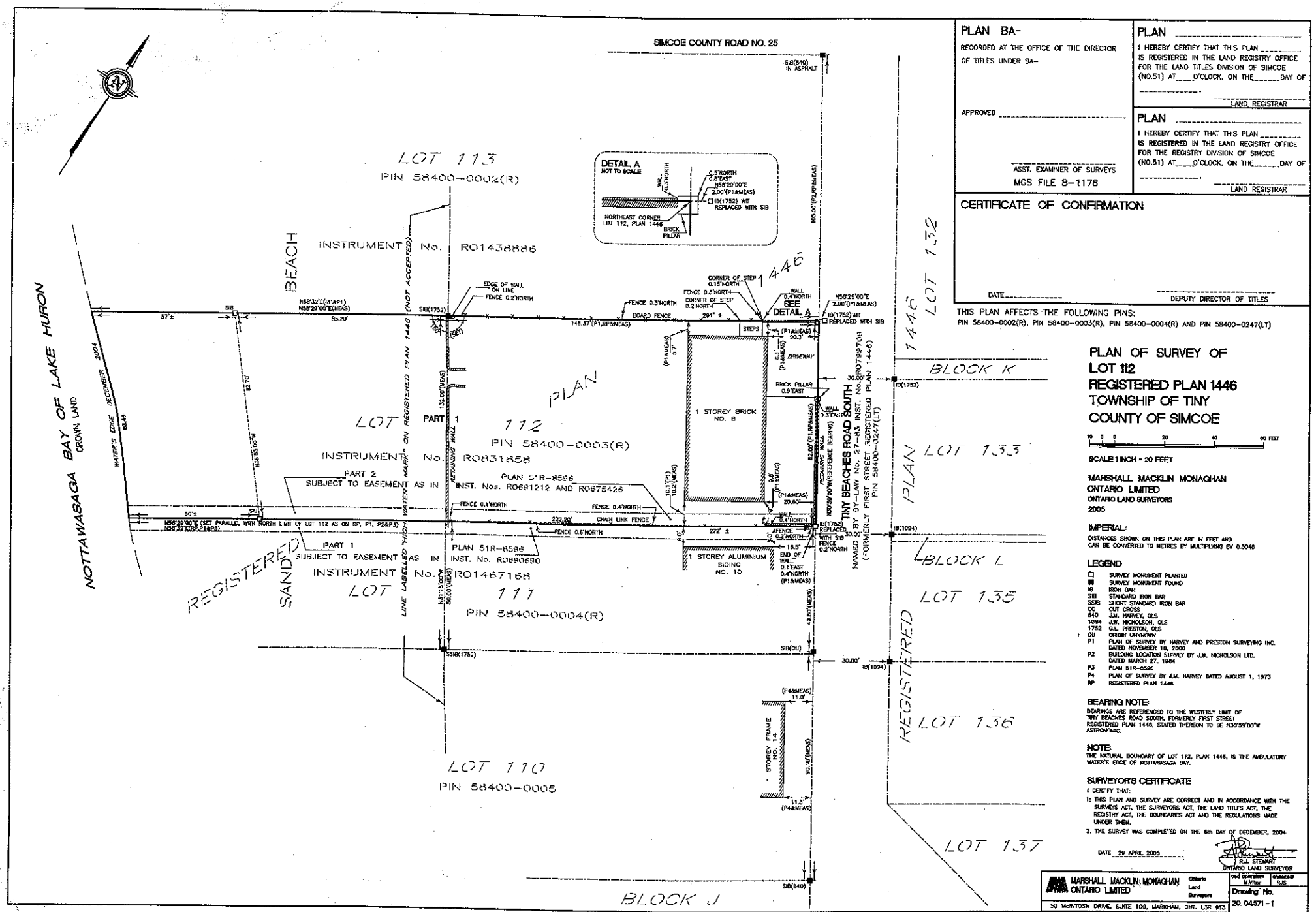
COSTS

The applicant requested costs. I concluded that the objections were neither frivolous or vexations so I decided that the parties should be responsible for their own costs.

Dated at the Municipality of Middlesex Centre (Village of Komoka) this 31st day of May 2006.

J. S. Cotterill O.L.S., O.L.I.P.
Deputy Director of Titles

B-1178



PLAN BA-

RECORDED AT THE OFFICE OF THE DIRECTOR OF TITLES UNDER BA-

APPROVED _____

ASST. EXAMINER OF SURVEYS

MGS FILE 8-1178

PLAN _____

I HEREBY CERTIFY THAT THIS PLAN _____ IS REGISTERED IN THE LAND REGISTRY OFFICE FOR THE LAND TITLES DIVISION OF SIMCOE (NO.51) AT ____ O'CLOCK, ON THE _____ DAY OF _____, _____

LAND REGISTRAR

PLAN _____

I HEREBY CERTIFY THAT THIS PLAN _____ IS REGISTERED IN THE LAND REGISTRY OFFICE FOR THE REGISTRY DIVISION OF SIMCOE (NO.51) AT ____ O'CLOCK, ON THE _____ DAY OF _____, _____

LAND REGISTRAR

CERTIFICATE OF CONFIRMATION

DATE _____

DEPUTY DIRECTOR OF TITLES

THIS PLAN AFFECTS THE FOLLOWING PINS:
PIN 58400-0002(R), PIN 58400-0003(R), PIN 58400-0004(R) AND PIN 58400-0247(LT)

PLAN OF SURVEY OF LOT 112 REGISTERED PLAN 1446 TOWNSHIP OF TINY COUNTY OF SIMCOE

10 5 0 20 40 60 FEET

SCALE 1 INCH = 20 FEET

MARSHALL MACKLIN MONAGHAN ONTARIO LIMITED
ONTARIO LAND SURVEYORS
2005

IMPERIAL:
DISTANCES SHOWN ON THIS PLAN ARE IN FEET AND CAN BE CONVERTED TO METRES BY MULTIPLYING BY 0.3048

LEGEND

□	SURVEY MONUMENT PLANTED
■	SURVEY MONUMENT FOUND
IB	IRON BAR
SIB	STANDARD IRON BAR
SSIB	SHORT STANDARD IRON BAR
CC	CUT CROSS
840	J.M. HARVEY, OLS
1094	J.W. NICHOLSON, OLS
1752	G.L. PRESTON, OLS
OU	ORIGIN UNKNOWN
P1	PLAN OF SURVEY BY HARVEY AND PRESTON SURVEYING INC. DATED NOVEMBER 10, 2000
P2	BUILDING LOCATION SURVEY BY J.W. NICHOLSON LTD. DATED MARCH 27, 1984
P3	PLAN 51R-8596
P4	PLAN OF SURVEY BY J.M. HARVEY DATED AUGUST 1, 1973
RP	REGISTERED PLAN 1446

BEARING NOTE:
BEARINGS ARE REFERENCED TO THE WESTERLY LIMIT OF TINY BEACHES ROAD SOUTH, FORMERLY FIRST STREET REGISTERED PLAN 1446, STATED THEREON TO BE N30°59'00"W ASTRONOMIC.

NOTE:
THE NATURAL BOUNDARY OF LOT 112, PLAN 1446, IS THE AMBULATORY WATER'S EDGE OF NOTTAWASAGA BAY.

SURVEYOR'S CERTIFICATE

I CERTIFY THAT:

1. THIS PLAN AND SURVEY ARE CORRECT AND IN ACCORDANCE WITH THE SURVEYS ACT, THE SURVEYORS ACT, THE LAND TITLES ACT, THE REGISTRY ACT, THE BOUNDARIES ACT AND THE REGULATIONS MADE UNDER THEM.
2. THE SURVEY WAS COMPLETED ON THE 6th DAY OF DECEMBER, 2004

DATE 29 APRIL, 2005

R.J. STEWART
ONTARIO LAND SURVEYOR

MARSHALL MACKLIN MONAGHAN ONTARIO LIMITED
Ontario Land Surveyors
50 McINTOSH DRIVE, SUITE 100, MARKHAM, ONT. L3R 9T3

field operations	checked
M.Vitor	R.J.S

Drawing No. 20.04571-1

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